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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 14, 15, 30, and 52

[FAC 2020-07; FAR Case 2018-005; Item IV; Docket No. FAR-2018-0006, Sequence No. 1]

RIN 9000-AN69

Federal Acquisition Regulation: Modifications to Cost or Pricing Data Requirements

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to increase the threshold for requiring certified cost or pricing data.

DATES: Effective: **[Insert date 30 days after date of publication in the *FEDERAL REGISTER*]**.

APPLICABILITY: In the case of a change or modification made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing

data remains \$750,000, with the following exception. Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to reflect a \$2 million threshold for obtaining certified cost or pricing data from subcontractors. Similarly for sealed bidding, upon request by a contractor, the contracting officer shall modify the contract without requiring consideration to replace the relevant clause. (See FAR 14.201-7(c)(1)(ii) and 15.408).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 or zenaida.delgado@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSAREgSec@gsa.gov. Please cite FAC 2020-07, FAR Case 2018-005.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on October 2, 2019, at 84 FR 52428, to increase the threshold for requesting certified cost or pricing data from \$750,000 to \$2 million for contracts entered into after June 30,

2018. The threshold for Cost Accounting Standards applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the one for requesting certified cost or pricing data.

This FAR change implements section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) that amends 10 U.S.C. 2306a and 41 U.S.C. 3502. Cost or Pricing Data: Truth in Negotiations, 10 U.S.C. 2306a, and Required cost or pricing data and certification, 41 U.S.C. 3502, require that the Government obtain certified cost or pricing data for certain contract actions listed at 15.403-4(a)(1), such as negotiated contracts, certain subcontracts and certain contract modifications. Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of changes

There are no changes as a result of comments on the proposed rule.

B. Analysis of public comments

Comment: One respondent opposed the proposed rule and believed it will result in higher prices to the Government.

Response: This FAR change is required to implement section 811 of the NDAA for FY 2018 that amends 10 U.S.C. 2306a and 41 U.S.C. 3502.

Comment: One respondent suggested revision of FAR 15.403-4(a)(3) to reflect the \$2 million threshold for both prime contracts and subcontracts entered into on and after July 1, 2018, to ensure consistency across the entire Truth in Negotiations Act certification process.

Response: The Councils cannot accept the suggestion because it is not consistent with the statute being implemented.

C. Other changes

Some changes included in the proposed rule are no longer necessary because of publication of the final rule under FAR Case 2018-007, FAC 2020-006, on May 6, 2020, effective June 5, 2020.

III. Expected Impact of the Final Rule and Proposed Cost Savings

DoD, GSA, and NASA have performed a regulatory cost analysis on this rule. The following is a summary of the estimated public and Government cost savings. This rule

will impact large and small businesses which currently compete on solicitations issued using FAR part 15 negotiation procedures and are valued between \$750,000 and \$2 million as these firms will no longer be required to submit certified cost or pricing data between those amounts. In addition, because of the comparable increase in the cost accounting standards threshold, fewer contractors will be required to comply with FAR clauses that implement the cost accounting standards. The following is a summary of the estimated cost savings calculated in 2016 dollars at a 7-percent discount rate and in perpetuity:

Summary	Public	Government	Total
Present Value Cost Savings	-\$588,988,385	-\$90,669,628	-\$679,658,013
Annualized Cost Savings	-\$41,229,187	-\$6,346,874	-\$47,576,061
Annualized Value Cost Savings as of 2016 if Year 1 is 2020	-\$31,453,549	-\$4,841,999	-\$36,295,548

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for "FAR Case 2018-005," click "Open Docket," and view "Supporting Documents."

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The changes are not applicable to contracts at or below the simplified acquisition threshold or to contracts for the acquisition of commercial items.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. The total annualized value of the cost savings is -\$36,295,548 (as of 2016 if Year 1 is 2020).

Details on the estimated cost savings can be found in section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is required to implement section 811 of the National Defense Authorization Act for Fiscal Year 2018 which amends 10 U.S.C. 2306a and 41 U.S.C. 3502 to increase the threshold for requesting certified cost or pricing data from \$750,000 to \$2 million. The threshold for Cost Accounting Standards applicability is required by 41 U.S.C. 1502(b)(1)(B) to be the same threshold as the one for requesting certified cost or pricing data.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

This rule will impact small entities who compete on solicitations issued using FAR part 15, Contracting by Negotiation, valued between \$750,000 and \$2 million. It also impacts subcontracts and contract modifications, including those contracts awarded under sealed bidding procedures, valued between \$750,000 and \$2 million. Offerors and contractors under the revised threshold will no longer be required to submit "certified cost or pricing data" and will now submit "data other than certified cost or pricing data," which takes less time to prepare.

In order to calculate the savings due to the increased threshold, the same FY 2016 Federal Procurement Data System (FPDS) data was utilized that was used to calculate information collection burdens associated with submission of certified cost or pricing data and of data other than certified cost or pricing data under the Office of Management and Budget (OMB) Control Number 9000-0013, which was cleared in January 2018. For contracts and orders awarded using FAR part 15 that were valued between \$750,000 and \$2 million, reflecting the actions impacted by the increase in the threshold, there were 2,697 contract awards/orders issued, 636 modifications to contracts or orders, an estimated 1,288 subcontracts awarded, and 592 subcontract modifications. Of these responses, 3,364 were from small entities. Of the 1,871 small entities that were awarded contracts or issued orders, 1,501 were unique small entities (about 1.25 contracts/orders per small entity).

We estimate a comparable ratio of actions to entities in the other categories. This ratio is less than the overall ratio of actions to entities because this is just a small slice of the total range covered by the information collection clearance. The cost accounting standards do not apply to small entities, therefore that threshold change only affects other than small entities.

The rule does not include additional reporting or record keeping requirements.

There are no available alternatives to the rule to accomplish the desired objective of the statute. However, the impact on small entities will be beneficial, as it will relieve them of the requirement to provide certified cost or pricing data when the acquisition is less than \$2 million. Instead, in most cases they would submit data other than certified cost or pricing data which is estimated to save 40 hours of labor effort and related cost savings for each submission not requiring certification.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Numbers: 9000-0013, Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, and 9000-0129, Cost Accounting Standards Administration. No comments were received on the revision to OMB Control Number 9000-0013 that was provided in the proposed rule. The annual reporting burden under OMB

Control Number 9000-0129 was revised using the \$2 million threshold; a 30-day notice was published on October 8, 2019, at 84 FR 53727.

List of Subjects in 48 CFR Parts 14, 15, 30, and 52

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 14, 15, 30, and 52 as set forth below:

1. The authority citation for parts 14, 15, 30, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 14—SEALED BIDDING

2. Amend section 14.201-7 by revising paragraph (c)(1) to read as follows:

14.201-7 Contract clauses.

* * * * *

(c)(1) When contracting by sealed bidding, the contracting officer shall—

(i) Insert the clause at 52.214-28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403-4(a)(1); or

(ii) Upon request of a contractor in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration to replace clause 52.214-28,

Subcontractor Certified Cost or Pricing Data—Modifications—
Sealed Bidding, with its Alternate I.

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PART 15—CONTRACTING BY NEGOTIATION

3. Amend section 15.403-4 by—

a. Revising the third sentence of paragraph (a) (1)
introductory text;

b. Revising the second sentence of paragraph
(a) (1) (iii) introductory text; and

c. Adding paragraph (a) (3).

The revisions and addition read as follows:

**15.403-4 Requiring certified cost or pricing data (10
U.S.C. 2306a and 41 U.S.C. chapter 35).**

(a) (1) * * * The threshold for obtaining certified
cost or pricing data is \$750,000 for prime contracts
awarded before July 1, 2018, and \$2 million for prime
contracts awarded on or after July 1, 2018. * * *

* * * * *

(iii) * * * Price adjustment amounts must
consider both increases and decreases (e.g., a \$500,000
modification resulting from a reduction of \$1,500,000 and
an increase of \$1,000,000 is a \$2,500,000 pricing
adjustment exceeding the \$2,000,000 threshold). * * *

* * * * *

(3) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract, without requiring consideration, to reflect a \$2 million threshold for obtaining certified cost or pricing data on subcontracts entered on and after July 1, 2018. See 15.408.

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4. Amend section 15.408 by revising paragraphs (d) and (e) to read as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(d) *Subcontractor Certified Cost or Pricing Data.* The contracting officer shall—

(1) Insert the clause at 52.215-12, Subcontractor Certified Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (b) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215-

12, Subcontractor Certified Cost or Pricing Data, with its Alternate I.

(e) *Subcontractor Certified Cost or Pricing Data—Modifications.* The contracting officer shall—

(1) Insert the clause at 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included; or

(2) Upon the request of a contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018, the contracting officer shall modify the contract without requiring consideration, to replace clause 52.215-13, Subcontractor Certified Cost or Pricing Data—Modifications, with its Alternate I.

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PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201-4 [Amended]

5. Amend section 30.201-4, in paragraph (b)(1), by removing "\$750,000" and adding "\$2 million" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.214-28 by—

a. Removing from the clause prescription "14.201-7(c)" and adding "14.201-7(c)(1)(i)" in its place; and

b. Adding Alternate I.

The addition reads as follows:

**52.214-28 Subcontractor Certified Cost or Pricing Data—
Modifications—Sealed Bidding.**

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SUBCONTRACTOR CERTIFIED COST OR PRICING DATA—MODIFICATIONS—SEALED BIDDING
(MAY 2020)

* * * * *

*Alternate I_([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER
DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]).* As prescribed in
14.201-7(c)(1)(ii), substitute the following paragraph (b)
in place of paragraph (b) of the basic clause:

(b) Unless an exception under FAR 15.403-1(b)
applies, the Contractor shall require the subcontractor to
submit certified cost or pricing data (actually or by
specific identification in writing), as part of the
subcontractor's proposal in accordance with FAR 15.408,
Table 15-2 (to include any information reasonably required
to explain the subcontractor's estimating process such as
the judgmental factors applied and the mathematical or
other methods used in the estimate, including those used in
projecting from known data, and the nature and amount of
any contingencies included in the price)–

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed \$750,000; or

(2) Before awarding any subcontract expected to exceed \$2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed \$2 million.

7. Amend section 52.215-12 by—

- a. Removing from the clause prescription “15.408(d)” and adding “15.408(d)(1)” in its place; and
- b. Adding Alternate I.

The addition reads as follows:

52.215-12 Subcontractor Certified Cost or Pricing Data.

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SUBCONTRACTOR CERTIFIED COST OR PRICING DATA (MAY 2020)

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Alternate I ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]). As prescribed in 15.408(d)(2), substitute the following paragraph (a) in place of paragraph (a) of the basic clause:

(a) Unless an exception under FAR 15.403-1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific

identification in writing), in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)–

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed \$750,000; or

(2) Before awarding any subcontract expected to exceed \$2 million on or after July 1, 2018, or modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed \$2 million.

8. Amend section 52.215-13 by–

- a. Removing from the clause prescription “15.408(e)” and adding “15.408(e)(1)” in its place; and
- b. Adding Alternate I.

The addition reads as follows:

**52.215-13 Subcontractor Certified Cost or Pricing Data–
Modifications.**

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SUBCONTRACTOR CERTIFIED COST OR PRICING DATA–MODIFICATIONS (MAY 2020)

* * * * *

Alternate I ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]). As prescribed in 15.408(e)(2), substitute the following paragraphs (a), (b), and (d) for paragraphs (a), (b), and (d) of the basic clause:

(a) The requirements of paragraphs (b) and (c) of this clause shall—

(1) Become operative only for any modification to this contract involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403-4(a)(1); and

(2) Be limited to such modifications.

(b) Unless an exception under FAR 15.403-1 applies, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15-2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price)–

(1) Before modifying any subcontract that was awarded prior to July 1, 2018, involving a pricing adjustment expected to exceed \$750,000; or

(2) Before modifying any subcontract that was awarded on or after July 1, 2018, involving a pricing adjustment expected to exceed \$2 million.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in each subcontract that exceeds \$2 million.

52.230-2 [Amended]

9. Amend section 52.230-2 by removing from the clause prescription "30.201-4(a)" and adding "30.201-4(a)(1)" in its place.

52.230-4 [Amended]

10. Amend section 52.230-4 by removing from the clause prescription "30.201-4(c)" and adding "30.201-4(c)(1)" in its place.

52.230-5 [Amended]

11. Amend section 52.230-5 by removing from the clause prescription "30.201-4(e)" and adding "30.201-4(e)(1)" in its place.

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